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in the

Supreme Court

of the

United States

OCTOBER TERM 1978

CASE NO. 78-1700

ROBERT CONROY, RAYMOND DAHL,
FREDERICK JACOBS AND
WALTER K. SCHUBERT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, ROBERT CONROY, RAYMOND DAHL, FREDERICK JACOBS AND WALTER K. SCHUBERT, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-styled case on February 23, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra* (pp. A1-A20) is reported at ___F.2d___ (5th Cir. 1979).

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1979, Appendix B, *infra* (p. A21). A timely petition for rehearing was denied on April 12, 1979. Appendix C, *infra* (p. A22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, *Rules of the United States Supreme Court*.

QUESTIONS PRESENTED

1. Whether the United States Coast Guard has law enforcement jurisdiction to enforce or assist in enforcing the Federal laws of the United States in foreign territorial waters, contrary to the specific language in 14 U.S.C. 2 and 89, when members of a Coast Guard vessel forcibly detained, boarded and searched a vessel in concededly Haitian waters?

2. Whether the trial court erred to the substantial prejudice of the Petitioners and contravened their Fourth Amendment protections against unreasonable

searches and seizures when it denied the Petitioners' motion to suppress evidence obtained by federal authorities through electronic surveillance based upon a warrantless, surreptitious installation of a "beeper" device upon a vessel while that vessel was moored within the continental limits of the United States?

STATUTES INVOLVED

The Federal statutory provisions involved, 21 U.S.C. 952 (a) and 963 are set forth in Appendix D and E, *infra* (App. 52-App. 55). The statutory authorization and jurisdictional limits for the United States Coast Guard, 14 U.S.C. 2, and 89, are set forth in Appendix F and G, *infra* (App. 56-App. 59). The Convention on the Territorial Sea and the Contiguous Zone, entered into force in 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639 1958, Section III, Article 14, is set forth in Appendix H, *infra* (pp. A).

STATEMENT OF FACTS

This is a prosecution under statutes familiarly known as the Controlled Substances Act, 21 U.S.C. 952 (a), and the conspiracy provisions of that act, 21 U.S.C. 963. The Petitioners were indicted on a multi-count indictment with one (1) other defendant for conspiracy to devise and the devising of a violation of the Controlled Substances Act by knowingly and intentionally importing it to the United States from a place outside thereof 7000 pounds of marijuana, a Schedule I controlled substance. The Petitioners were also charged with the substantive offense of importing into the United States that marijuana. The trial was held in the United States District Court for the Southern District of

Florida (Roettger, D.J.). The Petitioners were found guilty and sentenced thusly: Petitioner DAHL to thirty (30) months confinement followed by a three (3) year special parole term; Petitioner CONROY to fifty-four (54) months confinement plus a fifty-four (54) month special parole term; Petitioner SCHUBERT to sixty (60) months confinement plus a sixty (60) month special parole term; Petitioner JACOBS to a period of treatment and supervision pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010 (b). Petitioners CONROY and SCHUBERT were also sentenced to pay a $5,000 and $15,000 fine, respectively.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the conviction of the Petitioners. See A1-A20. The Court (Roney, Rubin and Vance, JJ.) concluded, as to the first question presented, that while the Fourth Amendment protects citizens wherever they may be in the world from unreasonable searches and the mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not dissipate its illegality under United States law, recent case decisions sufficiently interpreted 14 U.S.C. 89 (a) to include legislatively conveyed authority to the United States Coast Guard to execute civilian law enforcement activities in foreign waters. That is to say, that the expression, "upon the high seas and waters over which the United States has jurisdiction . . ." was not intended to be restrictive, and therefore the United States Coast Guard had implicit statutory authority to forcibly board and search an American vessel in foreign territorial waters even in the absence of express statutory authority. The Court concluded as to the second question presented that although the law of the Fifth Circuit held that the installation of a beeper on an automobile was a search within the meaning of the Fourth Amendment because it defeats the expectation of privacy of the automobile's occupant(s), and therefore requires the obtaining of a warrant or the demonstration of a sufficient basis for the failure to obtain such before the installation of such a device would be reasonable *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *affirmed* 537 F.2d 227 (5th Cir. 1976), and although there is at least as great an expectation of privacy in vessels, such as that at bar, the installation of the electronic beeping device is not an invasion of privacy, analogizing the electronic beeping with the decision of this Court in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed 2d 453 (1971).[1] The premise of *White*, said the Fifth Circuit, was that a participant to a conversation has no legal right to protect his erroneous belief that those with whom he confides will safeguard the secrets he divulges. (See A.).

Based upon oral communications received from a paid informant, Buzal, DEA agents "suggested" to the latter that he surreptiously install two (2) "beepers" which they would supply to him on board the vessel NAHOA. The informant was requested to turn on the "beepers" when the NAHOA was loaded with whatever controlled substance the group sailing the vessel was to obtain. No warrant was obtained to install either of the beepers and, contrary to DEA internal regulations, no "prior written authorization" was obtained by the

[1] In *United States v. White, supra*, the plurality of this Court held that there is no privacy invasion when a confidential informant wears a recording device and surreptiously transmits his own conversations with unknowing law breakers.

agents before their agent, Buzal, installed either of the beepers. The NAHOA sailed from Fort Lauderdale, Florida several weeks later. Anticipating that the NAHOA would proceed to Jamaica in an attempt to smuggle marijuana into the United States, the DEA requested Coast Guard assistance in sweeping and blockading the Windward Passage, a required route of return for the vessel. Several days later a DEA pilot, while flying over Jamaica, identified the beeper signal on his monitoring equipment and radioed the DEA who immediately advised the Coast Guard's Seventh District Headquarters. The Seventh District Headquarters immediately radioed the cutter DAUNTLESS directing the cutter to resume the barrier patrol she had originally begun several days earlier in the Windward Passage. The radio communications were necessitated because the DAUNTLESS did not have equipment necessary to monitor the DEA's beeper.

By the time the DAUNTLESS seized and boarded the NAHOA in Haitian territorial waters the Coast Guard's ". . . sole concern with the vessel and hull was (not) a document check," but rather to intercede a load of narcotics which the Coast Guard ". . . had information to believe . . . was bound for the United States . . ." candidly the DAUNTLESS' officer conceded that when he " . . . boarded it (the NAHOA) . . . " he did so, " . . to check documentation *and* to do a search; yes, sir." (Sr. 129).

The seizure, boarding and search of the NAHOA all occurred in Haitian territorial waters. The search of the vessel eventually lead to the discovery of approximately 7,000 pounds of marijuana.

As indicated above, the Court of Appeals for the Fifth Circuit affirmed Petitioners' convictions, basing that affirmance on the grounds that although the Coast Guard enabling statute, 2 U.S.C. Section 289, per se would not authorize the Haitian search, a reading of statutory language in conjunction with certain international law, the Convention of the Territorial Sea and the Contiguous Zone entered into in 1964, *supra,* to which Haiti is also a party, expands the jurisdictional authorization of the United States Coast Guard as set forth in the Code, *supra,* so as to permit it to conduct civil law enforcement activities in foreign territorial waters.

REASONS FOR GRANTING THE WRIT

1. Whether the United States Coast Guard has law enforcement jurisdiction to enforce or assist in enforcing the Federal laws of the United States in foreign territorial waters, contrary to the specific language in 14 U.S.C. 2 and 89, when members of a Coast Guard vessel forcibly detained, boarded and forcibly searched a vessel in concededly Haitian waters?

The first question presented concerns a fundamental question of the jurisdiction of United States authorities in foreign territories, including foreign territorial waters. It involves the interpretation of the enabling statute, 14 U.S.C. Sections 2 and 89, which must be strictly construed, and the review of the Fifth Circuit's speculation as to the congressional intent behind the amendment to the enabling statute following this Court's opinion in *Maul v. United States,* 274 U.S. 501, 47 S.Ct. 735, 71 L.Ed 1171 (1927). Although 52 years old, *Maul* represents this Court's most recent,

definitive language dealing with the express statutory authorization for the Coast Guard to seize domestic vessels as part of the civil law enforcement activities. This question also goes to the ability of the Circuit Courts of Appeal, in this case the Fifth Circuit, to speculate on the intent of the Congress in amending legislation following this Court's decision in *Maul v. United States, supra,* when the enabling statutes involved, 14 U.S.C. Sections 2 and 89 carefully delineate the jurisdictional parameters of the authority of the Coast Guard in enforcing or assisting in the enforcement of the civil laws of the United States. This is an area of law relatively new (the treaty upon which the Fifth Circuit predicates its interpretation of the statute having been entered into force in 1964) but the decisional authority in this regard, 52 years old, strongly contravenes the interpretation of the statutes whether read by itself or in conjunction with the treaty. With particular emphasis taken by the Government at the Fifth Circuit and as approved substantially by that court — that the *tandum* effect of the enabling statute and the treaty authorizes civil law enforcement activities by the Coast Guard in Foreign territorial waters — is a question to which this Court has never addressed itself. Moreover, the Fifth Circuit's conclusion that Congress' silence on a subject about which no one had suggested a need to speak should not be interpreted as reflecting an intent either to grant or deprive the Coast Guard of authority to proceed in foreign territorial waters to enforce American law (A.____), directly conflicts with other recent Fifth Circuit decisions which conclude that "it would be sophistry for the Court of Appeals to divine a congressional intent, on a subject Congress did not consider." *McGill v. Environmental Protection Agency,* ____ F.2d ____ (5th Cir. Slip Op. 76-4353, decided April 20, 1979).

A. THE ENABLING STATUTE, 14 U.S.C. 2 AND 89 SPECIFICALLY LIMIT THE JURISDICTIONAL AUTHORITY OF THE COAST GUARD IN ENFORCING OR ASSISTING THE ENFORCEMENT OF CIVIL LAW TO THE TERRITORIAL WATERS OF THE UNITED STATES AND "THE HIGH SEAS."

Since no statute expressly authorizes the Coast Guard to effect the boarding or searching of American vessels or otherwise enforce or assist in the enforcement of Federal law in foreign territorial waters, the Coast Guard lacked jurisdiction to do so and to seize the contents of the NAHOA. 14 U.S.C. Section 2 states:

> "The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the *high seas* and *waters subject to the jurisdiction of the United States.*"

Section 89 (a), *Code, supra,* further provides in pertinent part:

> "The Coast Guard may make inquiries, examinations, inspections and searches, seizures and arrests upon the *high seas* and *waters of which the United States has jurisdiction* for which the prevention, detection and suppression of violations of the laws of the United States. For such purposes, commissioned, warrant or petty officers may at any time go on board of any vessel subject to the jurisdiction, or the operation of any law, of the United States, address inquiries, to those on board, ex-

amine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. ***"

18 U.S.C. Section 7, defines the "special maritime and territorial jurisdiction of the United States," thusly:

> "(1) The high seas, and any waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, and any vessel belonging in whole or in part to United States or any citizen thereof . . . *when such vessel is within the admiralty and maritime jurisdiction of the United States and out of jurisdiction of any particular state."* (emphasis added)

19 U.S.C. Section 1581, granting "Officers of the Customs" special authority to seize, search or board vessels states in pertinent part:

> "(a) Any Officer of the Customs may at any time go on board of any vessel or vehicle *at any place in the United States or within the custom's waters* . . . and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to that end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.
>
> * * *

> "(m) The terms 'custom's waters' means in the case of a foreign vessel subject to a treaty or other arrangements between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize or otherwise to enforce upon such vessel upon the ***high seas*** the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States." (emphasis added)

That no precise statutory language exists empowering the Coast Guard to board and search vessels in foreign territorial waters is conceded by the Government. Only recently, the Fifth Circuit said in *United States v. Winter,* 509 F.2d 975, 984 (5th Cir. 1975) footnote 30:

> "There is little, if any, current authority construing the jurisdictional prerequisites of the statute. Rather, most of the case law regarding enforcement authority dates from the days of prohibition and arose either pursuant to the jurisdictional provisions of the former custom's statutes authorizing boarding, search and seizure and arrest aboard any vessel within four marine leagues of the United States coast or pursuant to bilateral prohibition enforcement treaties which allow the Coast Guard (or predecessor) to board, search, and arrest on a

vessel of the parties-state within an hour's sailing distance of the coast (measured by the vessel's sailing speed). (citations omitted)"

And the Fifth Circuit went on to say in the same decision at page 985,

"(t)hese challenges to the Coast Guard's jurisdiction to arrest raise interesting and perhaps difficult questions of law largely unresolved by federal precedent . . ."

before expressly declining to decide such questions at that time.

This Honorable Court in *Maul v. United States, supra,* specifically addressed the then existing statutory authority of the Coast Guard to (a) board and search as well as (b) seize vessels beyond four leagues of the coast of the United States. It determined that the statutory construction and an analysis of the predecessor statutes created a distinction: that the authority of the Coast Guard to board and search a vessel was limited to the territorial waters and high seas within twelve (12) miles of the United States' coast; that the authority of the Coast Guard to seize "on the high seas" was not so geographically limited and thus could occur anywhere "on the high seas." *Maul,* 274 U.S. at 507. This Honorable Court also concluded that the Coast Guard as "officers of the customs," possessed statutory authority to seize on the high seas beyond the twelve (12) mile coastal limit. *Id., supra* at 510 = 511. Neither *Maul* on the one hand and any subsequent decision of this Court on the other hand, nor any federal appellate court decisions since *Maul* answered the two (2) fundamental questions raised herein: the authority of the Coast Guard to (a) search and (b) board either on the high seas or foreign territorial waters.[2]

The Fifth Circuit's speculation as to the intent of Congress of expanding Coast Guard civil law enforcement jurisdiction to foreign territorial waters in the absence of such language in the enabling statutes and the legislative history thereto is especially curious since it is inconsistent with other holdings of the Court. In *McGill v. Environmental Protection Agency, supra,* that court (Judges Morgan, Fay and Rubin), one of whom presided on the panel deciding the decision on which review is now sought, said at page 4334 of its slip opinion:

"All parties to this litigation have vigorously presented their respective interpretations of Congress' failure to deal with the question presented. The debate concerning the significance of congressional silence is almost as difficult to resolve as Bishop Berkeley's famous question concerning whether there is noise when a tree falls in a forest and no one is present to hear it. It would be sophistry for us to divine a congressional intent on a subject it

[2] *United States v. Odom,* 526 F. 2d 339 (5th Cir. 1976), *United States v. One 43' Sailing Vessel,* 538 F. 2d 694 (5th Cir. 1976) and *United States v. Winter, supra,* did not decide the questions of (a) searches on the high seas and (b) boardings, searches or seizures in foreign territorial waters. Neither does *United States v. Hillstrom,* 533 F. 2d 209 (5th Cir. 1976), *cert. denied* 97 S.Ct. ____ (1977). Moreover, *United States v. Winter, supra,* the only federal appellate authority that could be found on this point, hold as constitutional Section 89(a) *Code, supra,* only with respect to a search if such search is a *valid* safety inspection.

did not consider. Nor would it be permissible for us simply to withhold judgment on the basis that there is no law to apply. Instead we must attempt, at least in part intuitively, to determine how we think Congress would have voted had the question been raised legislatively."

It seems difficult to conceive of a proposed legislation authorizing the armed incursion into foreign territorial waters by vessels which are labeled "ships of war" to civilly enforce or assist the enforcement of federal domestic law.

B. THE TANDUM CONSIDERATION OF INTERNATIONAL LAW, INCLUDING THE CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE, DOES NOT EXPAND THE CONGRESSIONALLY CREATED JURISDICTIONAL PARAMETERS OF THE COAST GUARD.

That which is not set forth in enabling legislation is not conferred and may not be presumed to have been conferred. *Harris v. C.I.R.*, 340 U.S. 106, 71 S.Ct. 181, 95 L.Ed 111 (1950). The jurisdictional expansion condoned by the Fifth Circuit was never conferred by the Congress in any of the four (4) amendments to the pertinent statutes since this Court's decision in *Maul.* See 1950 *U.S. Code Cong. Serv.*, p. 2306. The Fifth Circuit's decision also gives extra-territorial effect to the police power conferred upon the Coast Guard in the enabling statute, a precedent which contravenes the mandate of this Court that the general presumption is that a statute is not intended to have extra-territorial effect without con-

cise expressions of such. *United States v. Spelar,* 338 U.S. 217, 70 S.Ct. 10, 94 L.Ed 3 (1949).

To do that which has specifically been forbidden by this Court the Fifth Circuit interpreted Articles 14 of the Convention *in tandum* with the enabling statute, concluding that the two, when combined, sanctioned the Coast Guard's armed incursion into foreign territorial waters for civil law enforcement activities. The Convention, however, does not support the conclusion.

The only incursion to foreign territorial waters envisioned by the Convention is that which the treaty labels "innocent passage," more fully set forth in Article XIV of the Convention. It states, in pertinent part,

> "1. Subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
>
> "2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
>
> "3. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.
>
> "4. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of

the coastal state. Such passage shall articles and with other rules of international law."

4 Whitman, *Digest of International Law,* 417 (1965), defines the term "passage" to include, "where rendered necessary by ordinary incidence of navigation or the stress of weather or damage, the right to stop and weigh anchor." *Webster's New Collegiate Dictionary,* (1960) defines "passage":

> "1. The act of passing: transit from one place to another. 2. A means of passing; a way, channel or course . . . 4. right, liberty or permission to pass . . ."

The intentional, police-oriented armed incursion into foreign territorial waters for the express purpose of pursuing, forcibly detaining, boarding, searching and thereafter seizing the NAHOA is anything but "innocent passage," whether that term is defined by the dictionary or the precise treaty on which the Fifth Circuit based its conclusion.

The conclusion of the Fifth Circuit is based upon standards never before considered by this Court. Meanwhile, the Court of Appeals herein concerned is trivializing the standards of "territorial waters" and "upon the high seas" established by this Court in *Maul* and not since discussed in these past 52 years. All of this is to the detriment of the Petitioners who seek the same standard of law being applied to the executive authorities of the United States as they would apply to them and call upon this Court in this period when thoughtful people are seriously concerned about fundamental fairness and the excesses of authority

operating under color of law, to review the events and rulings of which review is herein sought, all of which they contend certainly warrant the attention of this Court.

2. Whether the trial court erred to the substantial prejudice of the Petitioners and contravened their Fourth Amendment protections against unreasonable searches and seizures when it denied the Petitioner's motion to suppress evidence obtained by federal authorities through electronic surveillance based upon a warrantless, surreptitious installation of a "beeper" device upon a vessel while that vessel was moored within the continental limits of the United States?

As recently as April 18, 1979 this Court reaffirmed the plurality decision in *Irvane v. California,* 347 U.S. 128 (1954) and the majority decision in *Silverman v. United States,* 365 U.S. 505, 511 - 512 (1961) that a federal officer may not, without a warrant and without consent, physically entrench into a man's office or home electronic surveillance and thereby secretly observe or listen. *Dalia v. United States,* ___U.S.___, ___ S.Ct.___, ___L.Ed 2d___, 25 Cr L 3022 (1979). At bar, the warrantless, surreptitious placement of the beeper devices constituted an illegal electronic surveillance within the meaning of the Fourth Amendment. Accord as to electronic surveillance: *United States v. Holmes,* 521 F.2d 839 (5th Cir. 1975), *petition for rehearing denied,* 537 F.2d 227 (5th Cir. 1976). In its decision below the Fifth Circuit irreconcilably conflicts with its own decision in *Holmes* and the mandates of this Court in *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L. Ed 746 751 (1886) and *United States v. Katz,* 353 U.S. 353, 88 S.Ct. 512, 19 L.Ed 2d 583. This is es-

pecially so with this Court's standard that the normal expectation of privacy at the time of the initial intrusion must be the test in determining violations of the Fourth Amendment proscription against unreasonable searches and seizures. This being so, there is, as the Fifth Circuit said in its *Holmes* decision:

> "No rational basis occurs for us where distinguishing the violation of the expectation of privacy involved in the installation of a "beeper" on a car, in order to trace its movements, from the placement of a tape on the outside of a telephone booth in order to overhear and record conversations, *Katz, supra* . . ."

Moreover, the "consent" which the Fifth Circuit establishes in order to allign its decision with that of this Court in *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed 453 (1971) and *Lopez v. United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed2d 462 (1963) totally misses the mark and trivializes the standards mandated by this Court. In *Lopez* and *White* the "consenting party" were the constant inherent participants to the conversation. At the worst, the *Lopez* and *White* conversations were semi-private in nature. This was not the situation by placing the beeper on board the NAHOA. There the beeper, once activated, continuously emitted electronic signals. Equating the "beeper" with an electronic "bug" or listening device renders apparent the difference in the "consent" standard established by this Court in *Lopez* and *White* and that to which it has been stretched in the Fifth Circuit below. Had the beeper been in fact a "bugging" device, once activated, it would have electronically transmitted every conversation within listening distance, whether

the informant/agent who planted the device was a participant of that conversation or not. Under such circumstances one can hardly say that "consent" as sanctioned by this Court in *White* and *Lopez* was the same as that which the Fifth Circuit considered.

The evil which has been condoned by the decision below is plain. The Petitioners seek no more than fundamental fairness in the application of the mandates of this Court in its interpretation of the Fourth Amendment as this Court itself would render. No less is expected within the federal criminal process. Because of the error as outlined above and the reasons for granting this writ, this petition is deserving of review by this Court.

CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert CONROY, Raymond Dahl,
Frederick Jacobs and Walter K. Schubert,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Leonard A. WALKER, a/k/a "Silver",
Defendant-Appellant.

Nos. 77-5436, 77-5444.

United States Court of Appeals,
Fifth Circuit.

Feb. 23, 1979.

Defendants were convicted before the United States District Court for the Southern District of Florida, at Fort Lauderdale, Norman C. Roettger, Jr., J., of either conspiracy or both conspiracy and attempting to import

marijuana into the United States. The Court of Appeals, held, in an opinion by Alvin B. Rubin, Circuit Judge, that: (1) installation by paid informant for the Drug Enforcement Administration of an electronic beeper on vessel used by defendants in their attempt to import marijuana into the United States was not an invalid warrantless search; (2) Coast Guard's search of American vessel in Haitian waters was not invalidated by lack of authority to make search; (3) flight of vessel upon approach of Coast Guard created exigent circumstances that, coupled with antecedent probable cause to believe that vessel was engaged in smuggling, justified subsequent warrantless search of vessel by Coast Guard; (4) evidence was sufficient to warrant conclusion beyond a reasonable doubt that a particular defendant had requisite knowledge and intent to be found guilty of conspiracy to import marijuana into the United States; (5) district court did not abuse its discretion in refusing to ask questions on voir dire examination in precise form requested by defendant, and (6) where trial court, in reviewing Jencks Act material, failed even to look at complete materials, thereby abdicating its responsibility to government counsel, reviewing court had no choice but to vacate judgment and remand for an appropriate examination.

Convictions of four defendants affirmed; judgment of conviction of fifth defendant vacated and case remanded for further proceedings as directed.

Alvin B. Rubin, Circuit Judge, dissented in part and filed opinion.

1. Searches and Seizures — 7(10)

Installation by paid informant for the Drug Enforcement Administration of an electronic beeper on vessel used by defendants in their attempt to import marijuana into the United States from Jamaica did not constitute an invalid warrantless search, since paid informant was under no legal obligation to conceal his whereabouts and thus transmission of signals on vessel was not an invasion of privacy of others, informant had right to be on board vessel and thus there was no trespass at time that beeper was installed, and there was probable cause to believe that vessel would be used to transport contraband. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures — 7(10)

Holmes decision that installation of a beeper on an automobile is a search within meaning of Fourth Amendment because it defeats expectation of privacy of automobile's occupant and is therefore prohibited unless a warrant is obtained or there is sufficient basis for failure to obtain a warrant to render act reasonable cannot be restricted to automobiles, because there is at least as great an expectation of privacy in vessels. U.S.C.A. Const. Amend. 4.

3. Criminal Law — 386

A participant in a conversation has no legal right to protect his erroneous belief that those in whom he confides will safeguard secrets he divulges, and, likewise, if informant may reveal conversation at a later time, he may contemporaneously transmit it to third persons.

4. Searches and Seizures — 7(10)

Although paid informant for the Drug Enforcement Administration who conspired with defendants to import marijuana into the United States from Jamaica was not vessel owner, he had a right to go aboard vessel and his placement of electronic beepers on vessel rather than on his person did not render its introduction invalid. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures — 7(10)

Fourth Amendment not only protects all within bounds of the United States; it also shelters citizens wherever they may be in the world from unreasonable searches by the United States Government. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures — 7(27)

Mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not disipate its illegality even though search would be valid under local law. U.S.C.A. Const. Amend. 4.

7. Shipping — 9

Although statute authorizing Coast Guard to make searches and seizures upon the high seas and waters over which the United States has jurisdiction for prevention, detection and suppression of violations of laws of the United States did not per se authorize search in territorial waters of another nation, phrase "upon the high seas and waters over which the United States has

jurisdiction" was not intended to be restrictive, and Coast Guard has implicit power to search an American vessel in foreign waters even in absence of express statutory authority. 14 U.S.C.A. § 89(a).

8. United States — 40

Powers that Congress gives agencies in executive branch are better when they are explicit, since statute that is express and unequivocal is least likely to be misunderstood or violated either by neglect or zealous overuse; however, authority may be granted by inference as well, and Congress, in its relationship with executive branch, is not bound by strictures that apply to criminal law and require such statutes to be explicit.

9. International Law — 2

International law is part of domestic law of the United States.

10. Armed Services — 29

Law of nations classifies Coast Guard vessels as warships; such vessels belong to state, are under direction of a military commander and manned by a military crew, and legally bear ensign of national navy.

11. International Law — 7

At least between parties to the Convention on the Territorial Sea and the Contiguous Zone, such as the United States and Haiti, a warship of one nation may enter territorial waters of the other without first giving notification and receiving authorization.

12. International Law — 7

Ratification by the United States of the Convention on the Territorial Sea and the Contiguous Zone manifested implicit authorization for its warships to do what warships of other nations might do.

13. International Law — 7

In Coast Guard's search of an American vessel in Haitian waters, there was a conjunction of implicit recognition by the United States Government of power of its warship to make search, and explicit approval of search by Haitian government, even though presumably no consent by Haitian authority was required under terms of the Convention on the Territorial Sea and the Contiguous Zone.

14. International Law — 7

Redress for improper seizure in foreign waters is not due to owner or crew of vessel involved, but to foreign government whose territoriality has been infringed by action. U.S.C.A. Const. Amend. 4.

15. Shipping — 9

Defendants, who were respectively charged with conspiracy or both conspiracy and attempting to import marijuana into United States, could not assail legality of seizure of their vessel by Coast Guard in Haitian waters. U.S.C.A. Const. Amend. 4; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

16. Searches and Seizures — 7(1)

Mere existence of statutory authority to make a search does not obviate need for Fourth Amendment compliance. U.S.C.A. Const. Amend. 4.

17. Shipping — 9

Flight of defendants' vessel upon approach of Coast Guard in Haitian waters of itself created exigent circumstances that, coupled with antecedent probable cause to believe that vessel was engaged in smuggling, justified Coast Guard's subsequent warrantless search of vessel. U.S.C.A. Const. Amend. 4.

18. Criminal Law — 1159.2(7)

On appeal from conviction, duty of the Court of Appeals was to determine whether a reasonable jury could, after hearing all evidence, conclude that defendant was guilty of specific crimes charged beyond a reasonable doubt; it would not suffice to show that beyond peradventure he was engaged in some other criminal act.

19. Conspiracy — 44½

To achieve a conviction on charge of willfully conspiring to commit offense against the United States, Government had burden of proving an agreement among defendants, intended purpose of which was a violation of United States law.

20. Conspiracy — 24

Essence of conspiracy is agreement; nobody is liable in conspiracy except for fair import of concerted purpose or agreement as he understands it.

21. Conspiracy — 40.1

It is not necessary that members of conspiracy know all details of plan, but they must be aware of essential nature and scope of enterprise and intend to participate; such knowledge must be clear and unequivocal, but it can be inferred from circumstances and conduct of parties involved.

22. Conspiracy — 28(3)

Conspiracy to import a controlled substance into the United States requires proof of an agreement to commit every element of that substantive offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

23. Conspiracy — 44½

Just as a defendant cannot be convicted of a conspiracy to import a controlled substance into the United States without knowledge that substance he was carrying was controlled, or without knowledge that he was transporting some substance, so the Government must meet burden of showing that conspiracy to import was directed at the United States. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

24. Conspiracy — 28(3)

Assuming that defendant, who was charged with conspiring to import a controlled substance into the United States, planned only to cooperate in smuggling of marijuana to Canada, rather than the United States, there was no criminal intent on his part cognizable in an American court and no federal interest involved. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

25. Conspiracy — 47(12)

Evidence was sufficient to warrant conclusion beyond a reasonable doubt that defendant had requisite knowledge and intent to be guilty of conspiracy to import marijuana into the United States Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

26. Jury — 131(10)

It is not an abuse of discretion for trial judge to choose to conduct voir dire examination himself. Fed. Rules Crim. Proc. rule 24(a), 18 U.S.C.A.

27. Jury — 131(15)

In prosecution for conspiracy to import marijuana into the United States, trial court did not abuse its discretion in its refusal to ask questions on voir dire examination in precise form requested by defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

28. Jury — 131(15)

In prosecution for conspiracy to import marijuana into the United States, it was proper for trial judge, during voir dire examination, to fail to give questions requested by defense counsel, which merely asked whether jury would, as required, fulfill its duty to decide case according to the law and the evidence, which were not designed to elicit any particular source of potential prejudice, and which were adequately covered in court's instructions. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

29. Jury — 131(8)

In prosecution for conspiracy to import marijuana into the United States, it was not improper for trial court, during voir dire examination, to fail to ask requested question as to whether fact that defendant was involved in procuring marijuana would prejudice jury in any manner against defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

30. Criminal Law — 627.8(6)

Although objection to Government exclusions from certain material produced under Jencks Act was pursued by defense only after Government informant left stand, it was raised immediately following direct examination by Government and was therefore not untimely. 18 U.S.C.A. § 3500.

31. Criminal Law — 627.7(1)

Task of determining whether statements relate to prosecution testimony, for purposes of disclosure under Jencks Act, is vested in trial court, not in Government. 18 U.S.C.A. § 3500.

32. Criminal Law — 627.8(4)

Jencks Act, which requires Government to produce any statement in its possession relating to subject matter of testimony of a witness who has taken stand for Government, does not mandate that trial judge examine voluminous material without assistance from government counsel and court need only review those sections that Government seeks to withhold; however, court should accomplish this by studying portions proposed to be expunged in their proper context as parts of complete document, and if court then determines that Government's expurgation is proper, defense has no further cause for complaint. 18 U.S.C.A. § 3500.

33. Criminal Law — 1181

Where court, in reviewing Jencks Act material, failed even to look at complete materials, thereby abdicating its responsibility to government counsel, reviewing court had no choice but to vacate judgment and remand for an appropriate examination. 18 U.S.C.A. § 3500.

34. Criminal Law — 914

If trial judge concluded on remand that production of some or all of alleged Jencks Act materials was un-

justly denied, in prosecution for conspiring to import marijuana into the United States, it would then become its duty to accord defendant a new trial unless it concluded that failure was harmless under *Goldberg* test. 18 U.S.C.A. § 3500.

35. Criminal Law — 770(2)

Defendant in a criminal prosecution is entitled to have court instruct jury on defense "theory of the case," assuming that theory has foundation in evidence and legal support.

36. Conspiracy — 48.2(2)
Drugs and Narcotics — 132

In prosecution for conspiracy or attempting to import marijuana into the United States, substance of defense theory was conveyed by trial court's instruction that to establish requisite specific intent Government was required to prove that defendant knowingly did an act which law forbids, purposely intending to violate law, and that proof of specific intent required proof that defendant knew that marijuana was destined for the United States, and thus a new trial was not required, despite trial court's failure to instruct jury in language requested by defendant; however, if a new trial were ordered because of expurgations from Jencks Act materials, then a more complete exposition would be appropriate. 18 U.S.C.A. §3500.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY, RUBIN and VANCE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

If the Coast Guard cutter DAUNTLESS is not otherwise recorded in history, her forays to protect coasts of the United States from illicit imports will be commemorated in decisions of the Fifth Circuit.[1] The defendants, convicted of either conspiracy or both conspiracy and attempting to import marijuana,[2] charge that the zeal of her lieutenant exceeded his statutory authority and led him to violate their constitutional rights by boarding their American vessel in Haitian waters. Having recently attempted to chart the rules concerning coast guard authority with respect to domestic vessels in coastal waters[3] as well as on the high

[1] *See United States v. Cadena*, 5 Cir. 1978, 585 F.2d 1252; *United States v. Rodriguez*, 5 Cir. 1978, 585 F.2d 1234; *United States v. One (1) 43 Foot Sailing Vessel "Winds Will"*, 5 Cir. 1976, 538 F.2d 694; *United States v. Winter*, 5 Cir. 1975, 509 F.2d 975, *cert. denied*, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41.

[2] Schubert was sentenced to five years imprisonment on each count, running concurrently, and an equal special parole term on the conspiracy count, and was fined $30,000. Conroy, who was convicted only on the conspiracy count, was sentenced to four and one-half years imprisonment and an equal special parole term, and was fined $5,000. Dahl was sentenced to two and one-half years imprisonment and a special parole term of three years on each count, running concurrently. Jacobs was sentenced pursuant to the Federal Youth Corrections Act. Walker, who was also convicted only on the conspiracy count, was sentenced to three and one-half years and a four year special parole term, and was fined $5,000.

[3] *See, e. g., United States v. Freeman*, 5 Cir. 1978, 579 F.2d 942; *United States v. Caraballo*, 5 Cir. 1978, 571 F.2d 975.

seas,[1] we now explore the same questions in the uncharted foreign domain.

I.

Once upon a time there was an informer, most of these tales begin. In this instance he was Flemming Larson Budal, a Danish citizen who was residing in the United States, had been an informer for several months, had worked on a number of other cases, and had been paid $200 a week by the Drug Enforcement Administration.

In December, 1975, Budal began a series of conversations with two of the defendants, Schubert and Conroy, in New England, and together they formulated a plan to smuggle a boatload of marijuana from Jamaica. During this time Budal was in constant communication with a special agent of the DEA.

Schubert obtained a 58-foot Gulfstar sailboat in Ft. Lauderdale. Soon afterwards Budal flew to Ft. Lauderdale where he was met by Dahl and Schubert, and another indictee who was separately tried. They were later joined by a fourth defendant, Jacobs, and together lived on the vessel, the NAHOA, until September 3, 1976, when they weighed anchor for Jamaica. Conroy remained in New England, allegedly to await the return of the other defendants with their cargo.

[1] *See, e. g., United States v. Warren*, 5 Cir. en banc 1978, 578 F.2d 1058; *United States v. One (1) 43 Foot Sailing Vessel "Winds Will"*, 5 Cir. 1976, 538 F.2d 694; *United States v. Hillstrom*, 5 Cir. 1976, 533 F.2d 209 *cert. denied*, 1977, 429 U.S. 1038, 97 S.Ct. 734, 50 L.Ed.2d 749; *United States v. Odom*, 5 Cir. 1976, 526 F.2d 339.

The DEA agent had furnished Budal two electronic detection devices of the kind known as beepers, one of which was to be turned on when the vessel was loaded. This device emits a signal by means of which its location can be determined by other electronic equipment. Rather then keep either on his person, Budal concealed one in the engine room and the other in an air vent on the NAHOA.

When the NAHOA was about 40 miles from Jamaica, the crew met the fifth defendant, Walker, who came out from the island on a small motorboat. Walker made four trips to the NAHOA ferrying marijuana.

The DAUNTLESS, under the command of Lieutenant Robert Council, was on border patrol in the Windward Passage between Haiti and Cuba, on guard for the NAHOA. When a DEA plane flying over nearby waters received an electronic signal from one of Budal's beepers, the DAUNTLESS attempted to establish a barrier patrol in the Windward Passage.

A day later the master of the DAUNTLESS recognized a radar beep on his scope as a vessel located about nine miles southwest of Haiti. He set his course for the vessel, and soon sighted her; it was, as anticipated, the NAHOA. He attempted to communicate with the vessel by radio, flag, and flashing lights, all signaling her to heave to. Nevertheless, those aboard the vessel set course straight for Haiti, and entered that nation's territorial waters.

Oral approval, later confirmed in writing, to enter Haitian waters and search the NAHOA was obtained

from the Haitian Chief-of-Staff, and the DAUNTLESS continued in pursuit. When on further signals, the NAHOA did not halt, the flag Sierra Quebec III was raised: this signifies "stop or we'll shoot." The NAHOA then hove to, and Lieutenant Council pulled alongside her in a small boat. He smelled marijuana, and asked permission to board. Schubert denied his request, but Lieutenant Council went on the vessel and requested the ship's papers. Schubert prevented him from entering the ship's cabin; the lieutenant ordered a search, and found 7000 pounds of marijuana.

Defendants Conroy, Schubert, Dahl and Jacobs contend that in this dramatic encounter the Coast Guard were little better, legally, than pirates. The installation of the beeper was an illegal search; the boarding of the vessel in Haitian waters exceeded the statutory authority of the Coast Guard and violated their constitutional rights because it was unreasonable and warrantless. In addition, defendant Walker, who was separately tried, alleges that there was insufficient evidence to convict him of conspiracy, and that procedural errors denied him a fair trial.

II. INSTALLATION OF THE BEEPER

[1, 2] A panel of this court has held that the installation of a beeper on an automobile is a search within the meaning of the Fourth Amendment because it defeats the expectation of privacy of the automobile's occupant; it is, therefore, prohibited unless a warrant is obtained or there is sufficient basis for the failure to obtain a warrant to render the act reasonable. *United States v. Holmes,* 5 Cir. 1975, 521 F.2d 859. En banc, the

court again affirmed the district court on the issue, but only by an evenly divided vote, 5 cir. 1976, 537 F.2d 227. For present purposes, we assume that the *Holmes* panel establishes the law of the circuit.[5] *Compare United States v. Abel,* 5 Cir. 1977, 548 F.2d 591, *cert. denied,* 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed.2d 273; *United States v. Emery,* 1 Cir. 1977, 541 F.2d 887; *United States v. Hufford,* 9 Cir. 1976, 539 F.2d 32, *cert. denied,* 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 614; *United States v. Frazier,* 8 Cir. 1976, 538 F.2d 1322, *cert. denied,* 1977, 429 U.S. 1046, 97 S.Ct. 751, 50 L.Ed.2d 759.

[3] Nonetheless we note that here, unlike *Holmes,* there was no trespass[6] when the beeper was installed for Budal had the right to be on board the vessel; moreover, there was probable cause to believe that the NAHOA

[5] As has been pointed out, *see* Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment,* 86 Yale L.J. 1461 (1977), *Holmes* represents a relatively restricted view of permissible police conduct with respect to beepers; this approach may be warranted because information yielded by beepers would not normally be accessible to the reasonably curious person. Certainly *Holmes* cannot be restricted to automobiles, because there is at least as great an expectation of privacy in vessels.

[6] *See Holmes, supra,* 521 F.2d at 865 ("In addition, of course, the 'beeper' installation was accomplished by an actual trespass.")

would be used to transport contraband.[7] However, validity of the installation of the electronic device does not rest only on these distinctions: the transmission of the signals was not, under the circumstances, an invasion of the privacy of others, for Budal was under no legal obligation to conceal his whereabouts. Thus the case is controlled by the decision in *United States v. White,* 1971, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453, in which a plurality of the court held that there is no privacy invasion when a confidential informant wears a recording device and surreptitiously transmits his own conversations with unknowing lawbreakers. That decision was based on the premise that a participant in a conversation has no legal right to protect his erroneous belief that those in whom he confides will safeguard the secrets he divulges. *See also Lopez v. United States,* 1963, 373 U.S. 427, 83 S.Ct. 1381, 10 L.ED.2d 462. If the informant may reveal the conversation at a later time, he may contemporaneously transmit it to third persons. Accordingly, in *Abel, supra,* we upheld, on the basis of the owner's consent, the warrantless installation of an electronic device on an airplane.

[7] In *Holmes, supra,* 521 F.2d at 866, the court rejected the probable cause basis, saying:

> The district judge determined otherwise because the agents, at the time of the installation had no information that the van had ever been used to transport contraband and no information that it would be so used in the instant transaction . . . He considered their actions as based only upon an unfounded suspicion, not confirmed until Holmes called agent Cox one and a half days later, on August 5, to say that the van would be used because of the large quantity of marijuana to be delivered.

[4] Here, Budal was not the vessel owner, but he had a right to go aboard, and his placement of the devices on the vessel rather than on his person does not render its introduction invalid.[8] *See also United States v. Cheshire,* 5 Cir. 1978, 569 F.2d 887, *cert. denied,* ___ U.S. ___, 98 S.Ct. 3097, 57 L.Ed.2d 1138 (consent by owner to installation on a plane he had rented to the defendant).

Appellants suggest that the beepers may have been installed without prior written authorization as required by the Internal Regulations of the DEA. Although the issue was fleetingly discussed during the trial court's hearing on the motion to suppress, there is no evidence in the record of noncompliance with the regulations. The regulations upon which the claim is based are not cited; in the absence of evidence establishing the existence of such a requirement and its breach, we do not reach the issue whether noncompliance, if shown, would require suppression of evidence obtained as a result of the improper installation. *See United States v. Caceres,* 9 Cir. 1976, 545 F.2d 1182, 1187, *cert. granted,* 1978, 436 U.S. 943, 98 S.Ct. 2843, 56 L.Ed.2d 784; *United States v. Leahey,* 1 Cir. 1970, 434 F.2d 7, 11.

[8] In this connection, we note that the beepers did not transmit private conversations. We have no occasion to consider whether a distinction might be drawn had a recording or transmitting device been placed that would intercept conversations in which Budal did not participate. *Cf. Irvine v. California,* 1954, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561, decided prior to the application of the exclusionary rule to the states in *Mapp v. Ohio,* 1961, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

III. THE SEIZURE IN FOREIGN WATERS

[5, 6] The Fourth Amendment not only protects all within our bounds; it also shelters our citizens wherever they may be in the world from unreasonable searches by our own government. *Reid v. Covert,* 1957, 354 U.S. 1, 5-6, 77 S.Ct. 1222, 1225, 1 L.Ed.2d 1148, 1157. *See* Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries,* 16 Colum. J. Transnat'l L. 495 (1977). The mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not dissipate its illegality even though the search would be valid under local law.[9] Indeed the United States does not here contend that those aboard the NAHOA were beyond the shield of the Fourth Amendment. The issue is whether the search was invalid because it was made without a warrant and by a federal agency, the Coast Guard, that lacked express statutory authority to conduct it.

[9]Cases admitting evidence seized by foreign authorities on the basis of insufficient American law enforcement involvement to warrant exclusion include: *United States v. Morrow,* 5 Cir. 1976, 537 F.2d 120, *cert. denied,* 1977, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806; *Stonehill v. United States,* 9 Cir. 1968, 405 F.2d 738, *cert. denied,* 1969, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747; *Brulay v. United States,* 9 Cir. 1967, 383 F.2d 345, *cert. denied,* 389 U.S. 986, 88 S.Ct. 469, 19 L.Ed.2d 478; *Birdsell v. United States,* 5 Cir. 1965, 346 F.2d 775, *cert. denied,* 382 U.S. 963, 86 S.Ct. 449, 15 L.Ed.2d 366. *Compare United States v. Mundt,* 10 Cir. 1974, 508 F.2d 904, *cert. denied,* 1975, 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103. The case applying the most restrictive role to federal use of evidence obtained by foreign authorities is *United States v. Jordan,* 1975, 23 C.M.A. 525, 50 C.M.R. 664, on reh. 1976, C.M.A., 19 Crim. L.Rep. 2025, a Court of Military Appeals decision.

A. Statutory Authority

[7] In *United States v. Warren,* 5 Cir. en banc 1978, 578 F.2d 1058, we held that the Coast Guard has authority under 14 U.S.C. §89(a)[10] to board American vessels on the high seas beyond the twelve-mile limit not only to inspect for safety and documentation but also to "look for obvious customs and narcotics violations." 578 F.2d at 1065. In *United States v. Cadena,* 5 Cir. 1978, 585 F.2d 1252, we gave the same statutory provision, Section 89(a), a reading broad enough to cover the stop on the high seas of foreign vessels subject to extraterritorial application of domestic law. That statute

[10]14 U.S.C. §89(a) provides in part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested . . .; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture . . . such vessel or such merchandise, or both, shall be seized.

in terms, however, would not reach the territorial waters of another nation for it relates only to "the high seas and waters over which the United States has jurisdiction."[11]

Conceding that the statute per se would not authorize the Haitian search, the government urges that the phrase, "upon the high seas and waters over which the United States has jurisdiction," was not intended to be restrictive, and that the Coast Guard has implicit power to search an American vessel in foreign waters even in the absence of express statutory authority. We agree.

The legislative history of the present form of the statute leads to the conclusion that the high-seas phrase was not intended to be restrictive. Before it was amended to incorporate that phrase, the statutory authority of the Coast Guard was examined in *Maul v. United States,* 1927, 274 U.S. 501, 47 S.Ct. 735, 71 L.Ed.1171. The majority opinion searched specific statutes to find express statutory authorization for the Coast Guard to seize domestic vessels on the high seas in enforcing the revenue laws. Mr. Justice Brandeis, with whom Mr. Justice Holmes joined, concurring, would not have rested on an interpretation of specific statutory authority because of his apprehension that "the construction adopted by the court may have in other cases

[11]Cf. *United States v. Pringle,* 5 Cir. 1978, 576 F.2d 1114, upholding a warrantless border search of mail by customs officials pursuant to statutory authority in 19 U.S.C. §1582, and *United States v. Freeman,* 5 Cir. 1978, 579 F.2d 942, similarly approving customs officers warrantless search of a vessel in customs waters (within four leagues of shore) pursuant to authority in 19 U.S.C. §1581(a).

far-reaching and regrettable results." 274 U.S. as 512, 47 S.Ct. at 739, 71 L.Ed. at 1176. He added that, notwithstanding what he perceived as lack of express statutory language, "authority [to seize American vessels beyond the territorial waters] exists because it is to be implied as an incident of the police duties of ocean patrol which Congress has imposed upon the Coast Guard." *Id.*

Thereafter, Congress amended Section 89(a) to incorporate the high-seas phrase in the hope of avoiding the problem foreseen by Mr. Justice Brandeis. The act was designed to overturn the *Maul* majority's strict interpretation of the laws governing the conduct of the Coast Guard, and the House Committee report quoted Mr. Justice Brandeis at length. H.R. Rep. No. 2452, 74th Cong., 2d Sess. 3-4 (1936). It cited with approval his view that "the Coast Guard is authorized to arrest American vessels subject to forfeiture under our law, no matter what the place of seizure and no matter what the law violated." *Id.* at 3. In supporting the new legislation governing the Coast Guard, the Committee observed, "In the future it is possible that, based upon some expressions in the majority opinion [in *Maul*], the contention will be made that express authority of law is necessary to secure enforcement by the Coast Guard of some laws and also to give jurisdiction to enforce those laws beyond the 12-mile limit." *Id.* at 2-3. The proposed legislation was intended "to prevent those possible 'far-reaching and regrettable results.' " *Id.* at 3.

The language adopted by Congress in enacting what is now Section 89(a) was adequate to deal with the precise situation presented in *Maul,* a search of an

American vessel on the high seas. However, while affirmatively empowering the Coast Guard to engage in law enforcement activities on the high seas and in American territorial waters, the resultant statute was silent as to the role of the Coast Guard elsewhere. The reason for the omission is apparent: the authority of the Coast Guard to proceed in foreign territorial waters simply was not a matter entertained by Congress while deliberating upon the statute.

Here, once again, as Chief Judge Brown has observed, we are asked "to determine what Congress would have thought about a subject about which it never thought . . . and one about which we have never thought nor any other Court has thought." *Wirth Ltd. v. S/S Acadia Forest,* 5 Cir. 1976, 537 F.2d 1272, 1276. Congress's silence on a subject about which no one had suggested a need to speak should not be interpreted as reflecting an intent either to grant or deprive the Coast Guard of authority to proceed in foreign territorial waters to enforce American law.

[8] Because neither mandate nor prohibition of search can be divined from Section 89(a), the Coast Guard's authority, if it exists, must be, as Mr. Justice Brandeis said, an incident of its other powers. The powers that Congress gives agencies in the executive branch are better when — as is usually the case — they are explicit. The statute that is express and unequivocal is least likely to be misunderstood or violated either by neglect or zealous overuse. Yet authority may be granted by inference as well; in its relationship with the executive branch, Congress is not bound by the strictures that apply to the criminal law, and require such

statutes to be explicit.[12] The pattern of legislation from 1790 to 1927 traced by Mr. Justice Brandeis and the subsequent congressional action we have here discussed, make it clear that, in the absence of objection by the sovereign power involved, Congress intended the Coast Guard to have authority to stop and search American vessels on foreign waters as well as on the high seas and in territorial waters even though it never said so with unequivocal didacticism.

B. International Law

[9] Our statutory interpretation of Coast Guard authority, premised on the concurring opinion of Mr. Justice Brandeis in *Maul,* is implicitly supported by principles of international law that justify law enforcement activities by the Coast Guard in foreign waters. International law is part of our domestic law. *The Paquete Habana,* 1900, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320, 328. The possible application of the law of nations to supplement the statute is consistent with the statement in the House of Representatives report, "The powers conferred by this act are not to be construed to affect any other powers conferred by existing law." H.R.Rep. No. 2452, at 4.

[10] The law of nations classifies Coast Guard vessels as warships. Such vessels belong to the State, are under the direction of a military commander and manned by a military crew, and legally bear the ensign of the national navy. *See* II C. Hyde, International Law

[12] *See, e.g., Bell v. United States,* 1955, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905; *United States v. Bridges,* 5 Cir. 1974, 493 F.2d 918, 922; *Simpson v. Simpson,* 5 Cir. 1974, 490 F.2d 803, 809, *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141.

395 (1922): Convention on the High Seas, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, art. 8.

Early interpretations of the law of nations denied the right of innocent passage to warships; it was thought that armed vessels did not "enjoy an absolute legal right to pass through a state's territorial waters any more than an army may cross the land territory," P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 120 (1927), and prior permission had to be obtained. Until 1959, a regulation issued by the United States Office of the Chief of Naval Operations provided, "Naval vessels should not be navigated in or near such claimed territorial waters without having obtained prior authorization from higher authority." 4 Whiteman, Digest of International Law 417 (1965).[13]

The United-Nations-sponsored Convention on the Territorial Sea and the Contiguous Zone entered into force in 1964; the United States Senate had previously ratified the Convention in 1960, and the President had signed it in 1961. 15 U.S.T. 1606, T.I.A.S. No. 5639 (1958). Haiti is also a party to the Convention. Thus the Convention represents existing U.S. policy, at least with respect to other party nations.

[13]Indeed, on one occasion in 1957, the commanding officer of an American naval vessel was reprimanded for entering Mexican territorial waters without prior permission from the Mexican government. The purpose of the entry was to investigate a fishing vessel in Mexican waters believed to be of American Registry. The reprimand followed a protest of the entry by the Mexican government. 4 Whiteman, *supra*, at 6-7.

After much debate, the draftsmen of the multilateral treaty rejected any requirement of previous authorization by a coastal state for the entry of a foreign warship into its territorial waters. *See* 4 Whiteman, *supra*, at 415-16. Article 14(1) of the Convention on the Territorial Sea and the Contiguous Zone states simply, "Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea." 15 U.S.T. at 1610. Article 16(1) provides that the coastal state may take "the necessary steps in its territorial sea to prevent passage which is not innocent." No distinction is made between warships and other vessels.

[11-13] At least between parties to the Convention, such as the United States and Haiti, a warship of one nation may enter the territorial waters of the other without first giving notification and receiving authorization.[14] Ratification of the convention by the United States manifests implicit authorization for its warships to do what the warships of other nations might do. The DAUNTLESS was not, of course, on a hostile mission. Indeed, it bears emphasis again that, despite the fact that presumably no consent by Haitian authority was required under the terms of the treaty, permission was in fact obtained. Therefore, in the ensuing search, there was a conjunction of implicit recognition by the United

[14]Some nations, all from the communist bloc, adopted the Convention with a reservation declaring that they believed that a coastal state had the right to establish procedures for the authorization of passage of foreign warships through territorial waters. 4 Whiteman, *supra*, at 416. Haiti is a party to the Convention without such a reservation. Treaties in Force, January 1, 1978, p. 327.

States Government of the power of its warship to make the search, and explicit approval of the search by the Haitian government.

[14, 15] Even had we been provided no guidance by the implicit authorization granted warships under the treaty, we would still be compelled to conclude that the defendants can not assail the legality of the seizure of their vessel in Haitian waters. Since 1815 it has been established that redress for improper seizure in foreign waters is not due to the owner or crew of the vessel involved, but to the foreign government whose territoriality has been infringed by the action. In *The Richmond,* 1815, 13 U.S. (9 Cranch) 102, 3 L.Ed. 670, the Court rejected a challenge similar to the one we face here to the seizure of an American registered vessel in the territorial waters of Spain. Chief Justice Marshall explained, "The seizure of an American vessel, within the territorial jurisdiction of a foreign power, is certainly an offense against that power, which must be adjusted between the two governments. This court can take no cognisance of it." 13 U.S. at 103, 3 L.Ed. at 671. Here, where not even the foreign government complains of the American assertion of sovereignty over its own vessel, defendants have no basis for complaint unless the seizure was improper on some other grounds.

C. Absence of a Warrant

[16, 17] We have dealt with other issues before reaching the constitutional question. Having concluded that the search was not invalidated by lack of authority to make it, we must consider whether the Coast Guard was required by the Fourth Amendment to obtain a warrant before proceeding. It is almost too obvious to re-

quire reiteration that the mere existence of statutory authority to make a search does not obviate the need for Fourth Amendment compliance.[15] This constitutional issue was involved both in *Warren, supra,* and in *Cadena, supra.* In each of these cases there was a warrantless search by the Coast Guard. The *Warren* majority, whom we have already quoted, recognized in Section 89(a) a grant of plenary authority to stop and board United States vessels on the high seas for either a safety-and-document inspection or to check for obvious customs and narcotics violations. Once aboard, if probable cause arises to suspect the presence of narcotics, a search can then be made of the vessel. Judge Fay dissented from the suggestion he found in the opinion that the statute gives plenary authority to search; nevertheless he began:

> No one can question that the Coast Guard may stop and search an American vessel on the high seas when it has probable cause to believe a crime has been or is being committed. [578 F.2d at 1079.]

[15] *See, e.g., Almeida-Sanchez v. United States,* 1973, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596. The U.S. Attorney may wish to draw to the attention of the Congress that, apparently, it has never given authority to any magistrate to issue warrants outside the confines of a judicial district. Rule 41(a), F.R. Cr.P. authorizes issuance of a warrant by a judicial officer "within the district wherein the property sought is located." *Cf. Berlin Democratic Club v Rumsfeld,* D.D.C.1976, 410 F.Supp. 144, 160. ("The court's authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas").

Neither opinion speaks directly to the question whether probable cause alone justifies the warrantless search of an entire vessel as compared to boarding for purposes of a safety-and-document inspection and a check for obvious customs and narcotics violations.

In *Cadena* a foreign vessel was intercepted on the high seas pursuant to Section 89(a) authority. The vessel's subsequent flight created probable cause to search without regard to any prior knowledge of the Coast Guard of the vessel's activities.

We find *Cadena* persuasive precedent. Here, as in *Warren* and *Cadena,* the Coast Guard had plenary authority to stop and board the ship. The DAUNTLESS was indeed lying in wait for the NAHOA. There was previously existing probable cause to believe the vessel was engaged in smuggling; we may assume, arguendo, that a warrant would have been necessary had the NAHOA docilely continued on its course, approached the DAUNTLESS and, upon being hailed, submitted to a search.[16] However, the NAHOA's flight of itself created exigent circumstances that, coupled with the antecedent probable cause, justified the subsequent warrantless search of the vessel.[17]

[16]*See United States v. Cadena,* 5 Cir. 1979, 588 F.2d 100 (denial of petition for rehearing).

[17]For a discussion of statutory and constitutional authority for searches of vessels, written prior to *Warren* and *Cadena,* see Carmichael, *At Sea With the Fourth Amendment,* 32 U.Miami L.Rev. 51 (1977).

IV. SUFFICIENCY OF THE EVIDENCE AS TO WALKER

All of the defendants were charged in an indictment alleging that they "did wilfully . . . conspire . . . to commit offenses against the United States. . . . It was part of said conspiracy that the defendants would knowingly and intentionally import into the United States from a place outside thereof, a controlled substance . . ." Although defendant Walker concedes that he loaded marijuana aboard the NAHOA, he contends, first, that there was insufficient evidence to establish that there was a conspiracy to import marijuana *into the United States;* moreover, even if the other defendants joined in such a scheme, there was no evidence whatsoever to establish that he had knowledge that the plot was directed at the United States. He maintains that he believed the NAHOA was bound for a rendezvous with a Canadian trawler off George's Bank when it was apprehended by United States Coast Guard authorities.

[18] Walker was convicted of conspiracy to violate 21 U.S.C. § 952(a) which makes it illegal "to import into the United States from any place outside thereof, any controlled substance . . ." Our duty here is to determine whether a reasonable jury could, after hearing all the evidence, conclude that the defendant was guilty of the specific crime charged beyond a reasonable doubt. *United States v. Restrepo-Granda,* 5 Cir. 1978, 575 F.2d 524, 527; *United States v. Alonzo,* 5 Cir. 1978, 571 F.2d 1384, 1387; *United States v. Warner,* 5 Cir. 1971, 441 F.2d 821, 825, *cert. denied,* 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. It would not suffice to show that beyond peradventure he was engaged in some other criminal act.

[19-21] To achieve a conviction on the conspiracy count, the government had the burden of proving an agreement among the defendants including Walker, the intended purpose of which was a violation of United States law. The essence of conspiracy is agreement; "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it." *United States v. Peoni,* 2 Cir. 1938, 100 F.2d 401, 403 (L. Hand, J.). *See also United States v. Borelli,* 2 Cir. 1964, 336 F.2d 376, 384, *cert. denied,* 1965, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555; *United States v. Andolschek,* 2 Cir. 1944, 142 F.2d 503, 507. It is not necessary that the members of the conspiracy know all the details of the plan, but they must be aware of the essential nature and scope of the enterprise and intend to participate. *United States v. Rosenblatt,* 2 Cir. 1977, 554 F.2d 36, 38; *Stanley v. United States,* 6 Cir. 1957, 245 F.2d 427, 430; *Duke v. United States,* 5 Cir. 1956, 233 F.2d 897, 901. Such knowledge must be clear and unequivocal, but can be inferred from the circumstances and conduct of the parties involved. *United States v. Addonizio,* 3 Cir. 1971, 449 F.2d 100, 102, *cert. denied,* 1972, 404 U.S. 1058, 92 S.Ct. 737, 30 L.Ed.2d 746; *United States v. Gallishaw,* 2 Cir. 1970, 428 F.2d 760, 763; *United States v. Fellabaum,* 7 Cir. 1969, 408 F.2d 220, 224, *cert. denied,* 396 U.S. 818, 858, 90 S.Ct. 55, 125, 24 L.Ed.2d 69, 109.

[22,23] Conspiracy to import a controlled substance into the United States requires proof of an agreement to commit every element of that substantive offense. Just as a defendant cannot be convicted of such a conspiracy without knowledge that the substance he was carrying was controlled, *see, e. g., United States v.*

Restrepo-Granda, supra, 575 F.2d at 529, or without knowledge that he was transporting some substance, *see, e. g., United States v. Jones,* 9 Cir. 1975, 518 F.2d 64, 67; *United States v. Jiminez,* 5 Cir. 1973, 484 F.2d 91, 92, so the government must meet the burden of showing that the conspiracy to import was directed at the United States. *Cf. Ingram v. United States,* 1959, 360 U.S. 672, 677-78, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 ("It is fundamental that a conviction for conspiracy . . . cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' *Pereira v. United States,* [1954,] 347 U.S. 1, 12, 74 S.Ct. 358, 364, 98 L.Ed. 435."); *United States v. Bright,* 5 Cir. 1977, 550 F.2d 240, 241 ("The essential elements of a criminal conspiracy are an agreement among the conspirators to commit an offense against the United States attended by an overt act of one of them in furtherance of the agreement"). *See also United States v. Barrera,* 5 Cir. 1977, 547 F.2d 1250, 1256; *United States v. Isaacs,* 5 Cir. 1975, 516 F.2d 409, 410, *cert. denied,* 423 U.S. 936, 96 S.Ct. 295, 46 L.Ed.2d 269.

The requirement that Walker know the destination of the cargo to be convicted of conspiracy to import marijuana into the United States in no way contradicts the holding of the Supreme court in *United States v. Feola,* 1975, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541. *Feola* concerned merely the interpretation of a conspiracy statute in order to divine and effectuate congressional intent. The Court concluded that a person who joins in a conspiracy to assault someone can be convicted of conspiracy to assault a federal officer even though the conspirator had no knowledge that the victim was a federal agent. "[I]n order to effectuate the congressional purpose of according maximum protection

to federal officers by making prosecution for assaults upon them cognizable in the federal courts, [18 U.S.C.] § 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. All the statute requires is an intent to assault, not an intent to assault a federal officer." *Id.*, 420 U.S. at 684, 95 S.Ct. at 1264, 43 L.Ed.2d at 552. This interpretation was followed by us in *United States v. Bell*, 5 Cir. 1978, 577 F.2d 1313, in determining the statutory elements of a conspiracy to violate the Dyer Act, 18 U.S.C. §§ 2312-2313, prohibiting interstate transportation of stolen motor vehicles.

[24.25] In *Feola*, the Court further noted that the defendant's state of mind may, however, be a relevant consideration; "[t]he statute does require a criminal intent," 420 U.S. at 686, 95 S.Ct. at 1264, 43 L.Ed.2d at 553. Here, if it be assumed that Walker indeed planned only to cooperate in the export of marijuana to *Canada*, there would be no criminal intent on his part cognizable in an American court and no federal interest involved. The importation of marijuana into Canada may or may not violate Canadian law. Even if it does, the question might be raised whether the Congress has the power, as a matter of due process, to make criminal a conspiracy entered into abroad directed only against another foreign country. We need not reach that question here for Congress has shown no intention even by remote implication to punish a person who in some other nation conspires against the laws of a third nation. Therefore, Walker's conviction on the conspiracy count necessarily must be supported by proof that he knew the marijuana was destined for the United States.

The government demonstrated the existence of an agreement involving marijuana smuggling, and showed continual activities related thereto, terminating only upon the capture of the NAHOA. There was testimony by the government informant, later contradicted by defendant Schubert on the witness stand, that the ship was bound for Connecticut or elsewhere on the eastern coast of the United States. The ship's name was written in English, and its master and all of the crew save Budal were Americans. There was also uncontroverted testimony by the government informant, Budal, that Schubert made phone calls to Walker in Jamaica during the course of the conspiracy, and that Walker joined the other defendants on board the NAHOA after the marijuana had been loaded. Had there been no testimony on behalf of the defense, Walker would not have been entitled to a directed verdict. The circumstantial evidence was sufficient to warrant his conviction.

The defense did offer Schubert's testimony regarding Walker's knowledge of the ship's destination. Schubert, it will be recalled, was one of the original planners. He testified unequivocally that the NAHOA was bound for George's Bank, and that Walker was the only one aboard the vessel to whom Schubert divulged the plan. Walker was apprised of the destination because "he had a financial interest in it." The defense sought to corroborate this by showing that the vessel did have a detailed chart of northern waters but none of the waters of the southern United States where the NAHOA was apprehended.

Clearly Walker joined in a plan to ship marijuana and he admittedly participated actively in efforts to consummate it. The jury might have believed

Schubert's account, or it might have found it adequate to create reasonable doubt that Walker knew the destination of the cargo. Yet, it might also have refused to believe Schubert when he identified the destination of the cargo as Canada and sought to exonerate Walker. Under the circumstances we cannot find that there was insufficient evidence to warrant the conclusion beyond a reasonable doubt that Walker had the requisite knowledge and intent to be guilty of conspiracy to import marijuana into the United States.

V. WALKER'S OTHER CLAIMS

A. Voir Dire

[26] It is no abuse of discretion for the trial judge to choose to conduct the voir dire himself. *United States v. Wertis*, 5 Cir. 1974, 505 F.2d 683, *cert. denied*, 1975, 422 U.S. 1045, 95 S.Ct. 2662, 45 L.Ed.2d 697; *United States v. Fruge*, 5 Cir. 1974, 492 F.2d 1163, *cert. denied*, 419 U.S. 856, 95 S.Ct. 101, 42 L.Ed.2d 88; *Hawkins v. United States*, 5 Cir. 1970, 434 F.2d 738; *see* F.R.Cr.P. 24(a).

[27] Although defendants assert error in the district court's failure to ask specifically requested questions on voir dire, Judges Roney and Vance have concluded that the voir dire examination conducted by the trial judge was adequate and fair. The trial court asked questions during voir dire designed to disclose any prejudice on the part of the venire panel. There was no abuse of discretion in its refusal to ask the questions in the precise form requested by defendant. *United States v. Ochoa*, 5 Cir. 1976, 543 F.2d 564.

The questions requested by Walker's counsel in full were:

> Mr. Walker is charged with conspiring and attempting to import marijuana into the United States. Mr. Walker admits that he was on board the vessel "NAHOA" which contained a large quantity of marijuana. Mr. Walker further admits that he procured the marijuana that was on board the vessel "NAHOA". Two of the essential elements of these offenses are that the marijuana found on the vessel "NAHOA" was destined for the United States and that the defendant Walker knew that the marijuana was destined for the United States.
>
> (a) If the Government fails to prove beyond a reasonable doubt that the marijuana found on the vessel "NAHOA" was destined for the United States, would you hesitate to return a verdict of Not Guilty?
>
> (b) If the Government fails to prove beyond a reasonable doubt that the defendant Walker knew that the marijuana found on the vessel "NAHOA" was destined for the United States, would you hesitate to return a verdict of Not Guilty?
>
> (c) Would the fact that Mr. Walker was involved in procuring the marijuana prejudice you in any manner against Mr. Walker?

[28] It was proper for the trial judge not to put parts (a) and (b) of the request to potential jurors. These sections merely ask whether the jury will, as required, fulfill its duty to decide the case according to the law and the evidence. They are not designed to elicit any particular source of potential prejudice and were adequately covered in the court's instructions. Counsel does not complain of their omission.

[29] The third requested question, the denial of which is claimed as error, was:

> Would the fact that Mr. Walker was involved in procuring the marijuana prejudice you in any manner against Mr. Walker?

Judges Roney and Vance conclude that it was not improper to refuse to ask this question. They reason that whether or not Mr. Walker procured the marijuana was certainly relevant to the precise crimes here charged and such evidence could be expected to be prejudicial to a contrary contention. Counsel may have intended to ask if the marijuana procurement would so influence a juror that an objective consideration could not be made of the critical question whether Walker knew the destination of the marijuana. As the question was phrased, however, a "yes" answer would not have revealed this information; a "no" answer could neither be expected nor be consistent with the juror's promise to decide the case on the evidence and instructions. A majority of this Court thus deciding there was no abuse of discretion in the failure to ask the requested questions on voir dire, the trial court's decision is affirmed.

Judge Rubin dissents from this conclusion and will assign his reasons separately.

B. The Jencks Act Material

Under the Jencks Act, 18 U.S.C. §3500, the government must produce any statement in its possession relating to the subject matter of the testimony of a witness who has taken the stand for the government. Upon motion, Walker's counsel received the statements relating to testimony by the informant Budal. However, parts of the materials were incomplete. The government had cut off parts of the pages and excised paragraphs of others. In addition, the date of each statement or report had been deleted.

[30] When defense counsel moved for in camera examination of the complete materials,[18] the government agreed to allow the court to read the file in its entirety; however, the court declined to look at the thick set of materials, noting "I have got better things to do than referee discovery." The government informed the court that all excised portions of the materials were, in its opinion, not discoverable under the Jencks Act, and the motion for in camera examination was then denied.

[18] Although the objection to the government excisions was pursued by the defense only after Budal had left the stand, it was raised immediately following direct examination by the government and was therefore not, as the government suggests, untimely. Moreover, Budal was still available and could have been recalled by the defense for further cross-examination in light of the revealed Jencks Act materials.

The Jencks Act requires that decisions about the discoverability of documents under its provisions be made by the trial court. 18 U.S.C. §3500(c) provides, in part,

> If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use.

As the Supreme Court held in *Palermo v. United States*, 1959, 360 U.S. 343, 354, 79 St.Ct. 1217, 1225, 3 L.Ed.2d 1287, 1296:

> [W]hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose.

[31-33] The task of determining whether statements relate to prosecution testimony is thus vested in the trial court, not in the government. *Scales v. United States*, 1961, 367 U.S. 203, 258, 81 S.Ct. 1469, 1501, 6 L.Ed.2d 782, 817. The duty may be onerous and unpleasant, but so, indeed, are many of the duties that judges assume. The Act does not, of course, mandate that the trial judge examine voluminous material without assistance from government counsel. The court need only review those sections that the government seeks to withold; but it should accomplish this by studying the portions proposed to be expunged in their proper context as parts of the complete document. If the court then determines that the government's expurgation is proper, the defense has no further cause for complaint. *See, e.g., Holmes v. United States*, 4 Cir. 1960, 284 F.2d 716, 720. But where the court fails even to look at the complete materials, thereby abdicating its responsibility to government counsel, the reviewing court has no choice but to vacate the judgment and remand for an appropriate examination. *United States v. Cleveland*, 7 Cir. 1973, 477 F.2d 310; *United States v. O'Brien*, 7 Cir. 1971, 444 F.2d 1082, 1086-87; *Bary v. United States*, 10 Cir. 1961, 292 F.2d 53, 58.

[34] If the trial judge determines that no part of the expunged materials need be produced, he should enter a new judgment. Walker may then have the record sealed and transmitted to this court for review of the trial court's determination. If, on the other hand, the trial judge concludes that production of some or all of the reports was unjustly denied, it would then become his duty to accord the defendant a new trial unless he concludes that the failure was harmless under the test set forth in *Goldberg v. United States*, 1967, 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603. *See also* discussion in *United States v. Beasley*, 5 Cir. 1978, 576 F.2d 626.

C. Refusal to Give Requested Jury Instruction

[35, 36] The defendant in a criminal prosecution is entitled to have the court instruct the jury on the defense "theory of the case", assuming that the theory has foundation in the evidence and legal support. *United States. v. Cullen,* 7 Cir. 1971, 454 F.2d 386, 390; *United States v. Vole,* 7 Cir. 1971, 435 F.2d 774; *Strauss v. United States,* 5 Cir. 1967, 376 F.2d 416. The defense here proffered the following instruction:

> It is the position of the defense that the marijuana found on the vessel "NAHOA" was *not* destined for the United States to the defendant Walker's knowledge but was rather destined for Canada.
>
> Unless you find that the Government has proven beyond and to the exclusion of a reasonable doubt that the marijuana was destined for the United States and that the defendant Walker knew that the marijuana was destined for the United States you must return a verdict of Not Guilty for Mr. Walker.

The trial court declined to give the second paragraph of this tendered instruction, but did instruct the jury that "[t]o establish specific intent [needed to convict the defendant of conspiracy or attempt] the Government must prove that the Defendant knowingly did an act which the law forbids, purposely intending to violate the law. Proof of specific intent requires proof that the Defendant knew the marijuana was destined for the United States." This instruction conveyed the substance of the defense theory, even if not in the exact

language requested. No more was indispensable. If a new trial is not required because of the expurgations from Jencks Act materials, then a new trial on this issue is not warranted. If, however, a new trial is ordered, a more complete exposition would be appropriate.

For these reasons, the convictions of Conroy, Schubert, Dahl, and Jacobs are AFFIRMED. The judgment of conviction of Walker is VACATED and his case remanded for further proceedings as directed above.

ALVIN B. RUBIN, Circuit Judge, dissenting as to defendant Walker only:

I regret that I must differ with my brethren concerning whether the trial judge abused the very wide discretion he is allowed in conducting voir dire. I recognize that some of my colleagues think voir dire is an appropriate adversary function, *e. g., United States v. Ledee,* 5 Cir. 1977, 549 F.2d 990, 993, *cert. denied,* 434 U.S. 902, 98 S.Ct. 297, 54 L.Ed.2d 188, and that my brethren on this panel are disposed to leave the question entirely to the discretion of the trial judge. Because, however, of my firm belief in court-conducted voir dire, my dissent on this issue may appear anomalous. For this reason, I expand my views.

As a trial judge, I personally conducted voir dire in every case tried before me for eleven years, and I continue to believe that when the trial judge is diligent in the scope of his inquiry and responsive to counsel's suggestions, this method of examining potential jurors has many advantages over counsel-conducted questioning. In most cases, advocates seek by voir dire not to obtain impartial jurors but to enlist persons already

predisposed in their favor. The trial judge is objective; his desire to achieve justice will be communicated to the jurors by his manner of conducting voir dire and by the phrasing of his questions. Therefore, his election to conduct a careful voir dire will usually better assure that the jury impanelled is fair and impartial and will, in addition, save time and invest the process with the appearance of integrity that it warrants.

If he assumes the task of conducting voir dire, the trial judge also takes on the responsibility of acting on behalf of both parties in determining whether any member of venire harbors possible prejudice however covert. The court must not only allow counsel to suggest questions that might identify potential prejudice, but must also put at least the substance of those inquiries to prospective jurors. *See Silverthorne v. United States,* 9 Cir. 1968, 400 F.2d 627, 638; *United States v. Lewin,* 7 Cir. 1972, 467 F.2d 1132.

My brethren have fully stated the entire series of voir dire questions requested by Walker's counsel. I agree with them that the trial judge did not err in failing to put parts (a) and (b). However, part (c) cannot be considered in isolation. Propounded alone and answered simply "yes" or "no," the question might not seem particularly enlightening. But as the full text of defense counsel's request shows, Walker admitted having procured the marijuana and being on board the "NAHOA"; his sole defenses were that the destination of the cargo was not the United States, but, if it was, he didn't know it. Under these circumstances, it was critical for defense counsel to know whether Walker's admitted complicity in a plot to ship marijuana (which he claimed was directed at Canada rather than the

United States) would prejudice any potential juror against him. The substance of the proposed question was calculated to elicit from potential jurors a clue as to whether they harbored any predisposition to convict Walker merely because he was engaged in international marijuana dealing rather than because he was guilty of the precise crimes charged. If any juror answered "Yes", he would assuredly have been challenged for cause. An equivocal answer or even the manner in which a negative answer was delivered might have induced counsel to exercise a peremptory challenge. No experienced trial lawyer would have wished to try Walker's case without this information.

In connection with requests for jury charges, we have repeatedly ruled that the trial judge may not refuse to charge a jury because the request is phrased inartfully. *Dahlgren v. United States,* 5 Cir. 1977, 553 F.2d 434, 440; *Ullman v. Overnite Transportation Co.,* 5 Cir. 1975, 508 F.2d 676, 677 n.2d; *Messer v. L.B. Foster Co.,* 5 Cir. 1958, 254 F.2d 412, 414. *See also Wilson v. Crouse-Hinds Co.,* 8 Cir. 1977, 556 F.2d 870, 874 n.8, *cert. denied,* 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455; *Posttape Associates v. Eastman Kodak Co.,* 3 Cir. 1976, 537 F.2d 751, 757; *Chavez v. Sears, Roebuck and Co.,* 10 Cir. 1975, 525 F.2d 827, 830; *Honeycutt v. Aetna Insurance Co.,* 7 Cir. 1975, 510 F.2d 340, 349 n.11, *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2416, 44 L.Ed.2d 679; *Weekes v. Michigan Chrome & Chemical Co.,* 6 Cir. 1965, 352 F.2d 603, 611; *Montgomery v. Virginia Stage Lines, Inc.,* 1951, 89 U.S.App.D.C. 213, 191 F.2d 770, 772. *See generally* 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2552 at 631 & n.25 (1971). If the substance of the request is clear, it is his obligation to give a correct charge.

A similar principle has been recognized in connection with voir dire. The trial court has, of course, very broad discretion in conducting voir dire, *e.g., United States v. Rojas,* 5 Cir. 1976, 537 F.2d 216, 219, *cert. denied,* 1977, 429 U.S. 1061, 97 S.Ct. 785, 50 L.Ed.2d 777; *United States v. Wertis,* 5 Cir. 1974, 505 F.2d 683, 684, *cert. denied,* 1975, 422 U.S. 1045, 95 S.Ct. 2662, 45 L.Ed.2d 697; *United States v. Gassaway,* 5 Cir. 1972, 456 F.2d 624, 626, but "subject to the essential demands of fairness." *Aldridge v. United States,* 1931, 283 U.S. 308, 310, 51 S.Ct. 470, 471, 75 L.Ed. 1054, 1056. The procedure used for testing prospective juror impartiality must create "a reasonable assurance that prejudice would be discovered if present." *United States v. Dellinger,* 7 Cir. 1972, 472 F.2d 340, 367, *cert. denied,* 1973, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706. Thus, refusal to inquire into a particular subject which affects the basic fairness of the trial is not acceptable. *United States v. Eastwood,* 5 Cir. 1973, 489 F.2d 818, 820.

The trial judge need not ask every question requested by counsel, or put the inquiry to any particular form. *Ham v. South Carolina,* 1973, 409 U.S. 524, 527, 93 S.Ct. 848, 850-51, 35 L.Ed.2d 46, 50. "It is enough if the court covers the substance of the necessary areas of its own questions." *United States v. Nell,* 5 Cir. 1976, 526 F.2d 1223, 1230 n.9. Broad, general inquiries into potential bias do not satisfy the court's duty in this regard. Once counsel had made the judge aware of the need to ascertain whether prospective jurors might be biased against Walker on the basis of his admitted involvement in marijuana smuggling, the judge had the obligation to put the substance of that question fairly.

After deliberating, the jury convicted Walker of conspiracy, but acquitted him of attempt. Because the only issue Walker contested at trial was his knowledge of the destination of the shipment, the verdicts appear to be inconsistent; the verdict of guilty on a single count may have been the result of a "bargain" to resolve a deadlock.

I would conclude that Walker was prejudiced by the failure to inquire into possible prejudgment of his guilt based merely on moral turpitude, and would grant him a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 77-5436

D. C. DOCKET NO. 76-6098-CR-NCR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT CONROY, RAYMOND DAHL,
FREDERICK JACOBS and
WALTER K SCHUBERT,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before RONEY, RUBIN and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of appellants Conroy, Schubert, Dahl and Jacobs in this cause be, and the same are hereby, affirmed.

February 23, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

April 12, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-5436-U.S.A. v. ROBERT CONROY ET AL.
NO. 77-5444-U.S.A. v. LEONARD A. WALKER Etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.*

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By /s/Sally Hayward
Deputy Clerk

CC: Mr. Melvyn Kessler
Mr. Michael P. Sullivan
Ms. Barbara Schwartz
Mr. David K. Kelley

*filed on behalf of appellants Conroy, Dahl Jacobs and Schubert

APPENDIX D

§952. Importation of controlled substances — Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that —

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States —

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled

substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance —

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe, except that if a nonnarcotic controlled substance in schedule III, IV, or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

Pub.L. 91-513, Title III, §1002, Oct. 27, 1970, 84 Stat. 1285.

APPENDIX E

§963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-513, Title III, §1013, Oct. 27, 1970, 84 Stat. 1291.

APPENDIX F

TITLE 14

COAST GUARD

CHAPTER 1.—ESTABLISHMENT AND DUTIES

§2. Primary duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war.

As amended Oct 5, 1961, Pub.L. 87-396, §1, 75 Stat. 827; June 12, 1970, Pub.L. 91-278, §1(1), 84 Stat. 304; Dec. 12, 1974, Pub.L. 93-519, 88 Stat. 1659.

Library references: Shipping — 11; C.J.S. Shipping §5.

1974 Amendment. Pub.L. 93-519 added the provision requiring the Coast Guard to develop, establish, maintain and operate, pursuant to international agreements, icebreaking facilities in waters other than those subject to the jurisdiction of the United States.

1970 Amendment. Pub.L. 91-278 improved and clarified the text, substituting "on and under" for "upon" in clause preceding first semicolon; inserting "and under" after "life and property on" and deleting "on " after "the high seas and" in clause preceding second semicolon; and substituting "icebreaking" for "icebreaking" and inserting "under," after "promotion of safety on" in clause preceding third semicolon, respectively.

1961 Amendment. Pub.L. 87-396 required the Coast Guard to engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States.

Legislative History: For legislative history and purpose of Pub.L. 87-396, see 1961 U.S. Code Cong. and Adm.News. p 3339. See, also. Pub.L. 91-278, 1970 U.S. Code Cong. and Adm.News, p. 3249; Pub. L. 93-519, 1974 U.S.Code Cong. and Adm.News, p. 6452.

Index to Notes

Generally ½
Due care 1
Rescue operations 2

½. Generally

United States Coast Guard was exclusive and sole authority for determining navigational needs on, near or about sewer pipe installed in bay by city and city had no authority to alter, correct, prescribe or otherwise take measures warn-

APPENDIX G

§89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States. Aug. 4, 1949, C. 393, § 1, 63 Stat. 502; Aug. 3, 1950, c. 536, § 1, 64 Stat. 406.

APPENDIX H

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

(15 UST 1606)

The States Parties to this Convention
Have agreed as follows:

Part I

TERRITORIAL SEA

Section III. Right of Innocent Passage
Sub-Section A. Rules Applicable to All Ships

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.